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No. 00-1770

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

V.

PEARLIE RUCKER, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES (CLPHA), HOUSING AND DEVELOPMENT LAW INSTITUTE (HDLI), NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS (NAHRO), AND PUBLIC HOUSING AUTHORITIES DIRECTORS ASSOCIATION (PHADA) IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Council of Large Public Housing Authorities (CLPHA) is a not-for-profit organization whose membership consists of 55 of the largest public housing authorities (PHAs) in the

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[1] The parties have consented to the filing of this brief. The consents have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amici curiae*, CLPHA, HDLI, NAHRO and PHADA, state that the counsel named below authored this brief in its entirety, and no party or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief.

country. CLPHA members collectively own and manage 40% of the nation's public housing stock. CLPHA's function is to educate and advocate on behalf of its membership before the United States Congress and various government agencies, including HUD, and to research and develop policy on matters relevant to the operations and funding of public housing.

Housing and Development Law Institute (HDLI) is a nationwide nonprofit organization that acts as a legal resource to local public housing agencies and their legal counsel. In addition to publishing legal periodicals and conducting educational activities relating to the law of affordable housing, HDLI acts on its members' behalf with respect to legal aspects of state and federal housing policy.

National Association of Housing and Redevelopment Officials (NAHRO) is a nationwide nonprofit organization dedicated to facilitating local community development and the provision of decent, safe and sanitary housing to low-income families. Formed in 1933, with membership including more than 8,000 agencies and local officials, NAHRO is the oldest and largest national membership organization devoted to affordable housing and community development. NAHRO's member agencies own or manage approximately 99% of all public housing in the United States. NAHRO has played a key role in the development and implementation of the nation's housing programs since their inception.

Public Housing Authorities Directors Association (PHADA) is a nationwide nonprofit advocacy organization formed in 1979 whose membership consists of approximately 1900 executive directors of public housing agencies. In addition to advocating for better, more efficient administration of the federal affordable housing programs, PHADA conducts a variety of training and educational activities concerning the development and operation of affordable housing.

The organizations comprising the *amici curiae*, represent public housing agencies (PHAs) and individuals responsible for managing virtually all of the nation's public

housing units. The *amici curiae* believe that the legal standards governing the removal of public housing families whose members and guests commit crimes vitally impact upon the ability of PHAs to successfully manage their public housing. The *amici curiae* further believe that, if sustained, the decision under review will have a disastrous effect upon the efficacy of PHAs' efforts to combat illegal drugs and crime in public housing developments and, consequently, upon the physical and social well-being of the hundreds of thousands of law-abiding residents of public housing.

SUMMARY OF ARGUMENT

This case involves the meaning of statutory language that authorizes terminations of public housing tenancy for drug-related and other criminal activity engaged in by public housing tenants, household members, guests or other persons under the tenant's control. The court below determined that the language was ambiguous because it did not specifically address whether proof of the tenant's knowledge of, or lack of effort or ability to prevent, criminal drug activity by a household member or guest was prerequisite to eviction. It then determined, through resort to certain legislative statements and the application of certain devices of statutory construction, that Congress must have intended the statute to include such a requirement.

Amici curiae argue first that, because the statutory language at issue is clear and unambiguous on its face, the lower court erred in consulting materials extrinsic to the statutory language. Even if such an inquiry were appropriate, however, the lower court's determination of congressional intent was erroneous. Its inquiry ignored available information created contemporaneously with the original enactment of the statutory language in 1988 and, instead, improperly focused on non-historical, noncontemporaneous legislative statements which did not, and could not have, represented the intent of Congress. A proper inquiry, focusing upon genuine legislative history created in connection with the enactment of the statutory language in question, together with consideration of all relevant subsequent indications of congressional intent, reveals an intent

directly contrary to that found by the court below.

The court below improperly failed to defer to the definitive interpretation of the statute by the United States Department of Housing and Urban Development (HUD). Such deference is required by prior decisions of this Court.

By assuming that PHAs may evict individual household members, the decision under review misconceived the nature of state laws under which public housing evictions proceed. With rare exception, these laws contemplate only actions for possession of real property.

In determining that an innocent tenant defense must be read into the statute, the court below also ignored the practical realities faced by PHAs in their efforts to control illegal drugs and crime in their developments. First, the lower court's decision ignores the endless character of the public housing lease, which forecloses to PHAs the option not to renew leases and necessarily increases their reliance on the remedy of eviction. Additionally, PHAs, when they must evict, have little practical ability to prove a tenant's prior knowledge of criminal activity committed by a household member or guest. Similarly, they have no practicable means of rebutting self-serving assertions by tenants that efforts have been made to discourage criminal activity. Finally, judicial imposition of an innocent tenant defense will discourage tenants from cooperating in the removal and bar of criminal offenders from public housing environments, a step that constitutes in many instances the only viable alternative to eviction of entire households. If sustained, the decision under review will seriously interfere with the ability of PHAs to combat drugs and crime in public housing.

Congress and HUD have conferred upon the PHAs, not the courts, the discretion to determine, once a lease violation is established, whether eviction is the proper course of action. These discretionary decisions involve a complex array of considerations, only some of which concern fairness to members of the household whose tenancy would be terminated. The full range of relevant considerations affecting each case are

usually are known only to the PHA. Thus, it is the PHA which is best positioned, and which has been given the authority under the regulatory scheme, to determine issues of fairness in individual cases.

Amici curiae urge that imposing responsibility on the tenant for assuring that members of the household and guests will not engage in criminal activity is neither unreasonable nor, as asserted by the court below, "odd and absurd." This is especially so, since retaining a family whose members or guests commit crimes has the effect of excluding from the scarce resource that is public housing an equally needy family whose members do not commit crimes. The proper inquiry in this case is not whether the PHA has exercised its discretion fairly in particular cases, but whether Congress and HUD have acted reasonably in repositing with the PHAs the discretion to determine when eviction is the appropriate remedy. In view of the seriousness of the drug and crime problems addressed by the legislation enacting the statutory language in question, there can be no doubt that Congress and HUD did act reasonably.

ARGUMENT

The Oakland Housing Authority (OHA) brought state court unlawful detainer actions to evict four tenants from public housing because of drug-related criminal activity engaged in by household members or guests. Each of the tenants asserted that he or she had no prior knowledge of, or involvement in, the criminal activities precipitating the evictions and, as such, each was an "innocent tenant." The United States Court of Appeals for the Ninth Circuit (Ninth Circuit), acting *en banc*, ruled 7 to 4 that the applicable HUD regulations and OHA's lease provision carrying out the regulations were invalid because the authorizing statutory provision for the HUD regulations did not contemplate the eviction of innocent tenants. The court held that "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, [the statute] does not authorize the eviction of such a tenant." *Rucker v. Davis*, 237

F.3d 1113, 1126 (9th Cir. 2001).[2]

The matter before this Court involves the meaning of § 6(*l*)(6) of the United States Housing Act of 1937 (Housing Act), and more specifically the meaning of the portion of this paragraph that is underlined below. Section 6(*l*)(6) was originally enacted (as § 6(*l*)(5)) in the Anti-Drug Abuse Act of 1988 (Drug Act).[3] As enacted in 1988, it required public housing leases to provide that:

> a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy. (emphasis added).

The 1988 provision has been modified minimally by Congress. An amendment in 1990 added the condition that for criminal activity (other than drug-related criminal activity)[4] to

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[2] The court affirmed injunctive relief against evictions for drug-related activity occurring outside the unit in circumstances in which the tenant neither knew nor had reason to know of the criminal activity. With respect to evictions for drug-related activity within the unit, the court recognized a rebuttable presumption that the tenant controlled the activity. *Id.* at 1126-27.

[3] Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300 (1988).

[4] Section 714(a) of S. 566, as reported by the Senate Committee on Banking, Housing, and Urban Affairs, would also have made drug-related criminal activity subject to the condition that the activity threaten the health, safety or right to peaceful enjoyment of the premises by other tenants, S. Rep. No. 101-316, at 179 (June 8, 1990), but this condition was removed in conference. *See* H.R. Conf. Rep. No. 101-943, at 111 (Oct. 25, 1990). As amended by the Senate reported bill, paragraph (5) of § 6(*l*) of the Housing Act read as follows:

be grounds for eviction, the criminal activity had to be a threat to the health, safety or right to peaceful enjoyment of the premises by other tenants, and the 1990 amendment also rephrased the provision without any further substantive change.[5] *The 1990 amendment did not address or change the provisions of the 1988 law that are relevant to this case.* Finally, in 1996 the geographic limitation that required drug-related criminal activity to have occurred on or near the public housing premises was removed.[6] The amended language, which has not been further changed, requires public housing agencies to utilize leases that:

> (6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy....[7]

> (5) provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in activity that adversely affects the health, safety, and right to quiet enjoyment of the premises by other tenants and shall not engage in criminal activity, including drug-related criminal activity, that threatens the health or safety of, or right to quiet enjoyment of the premises by, other tenants, and such criminal activity shall be cause for termination of tenancy.

The Senate reported bill did not rewrite paragraph (5), but merely deleted and added language to paragraph (5), none of it touching the language in paragraph (5) that is at issue before this Court. S. 566, 101st Cong. (1990).

[5] This paragraph was rephrased by the conferees and enacted in substantially its current form, Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 504, 104 Stat. 4079, 4185 (1990).

[6] Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9(a)(2), 110 Stat. 834, 836 (1996).

[7] 42 U.S.C. § 1437(d)(*l*) (emphasis added).

This statutory language is unambiguous in not providing an "innocent person" defense to a PHA's authority to evict a tenant for the criminal acts of a household member or guest.[8]

I. THE LOWER COURT'S DETERMINATION OF CONGRESSIONAL INTENT WAS ERRONEOUS.

Assuming, *arguendo*, that an inquiry to determine congressional intent beyond the plain language of the statute is appropriate, any inquiry into legislative intent should focus on the provision enacted in 1988. The Anti-Drug Abuse Act of 1988 was multi-faceted legislation that reflected the apprehension of Congress and the public over the perceived escalation in drug activity in public housing and elsewhere.[9] In

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[8] Essentially, the court below asserted that § 6(*l*)(6) was facially ambiguous, not because of what it says, but rather because of what it does *not* say. The *amici curiae* find nothing unclear about the language and urge that to apply such a standard would subject virtually any text that does not specify what it does not mean, or what it does not say, to a charge of ambiguity. This Court has stated that where the statutory command is straightforward, there is no reason to resort to legislative history. "Where there is no ambiguity in the words, there is no room for construction...." *United States v. Gonzales*, 520 U.S. 1, 8 (1997) (internal quotations and citations omitted). Section 6(*l*)(6) should be given its plain meaning. *See also United States v. James*, 478 U.S. 597, 606 (1986) ("We have repeatedly recognized that [when] . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances . . . . In the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive.") (internal quotations and citations omitted).

[9] *E.g.*, House Comm. on Gov't Operations, *Just Saying No Is Not Enough: HUD's Inadequate Response To The Drug Crisis In Public Housing*, H.R. Rep. No. 100-702 (June 15, 1988). Indeed, Congress' findings contained in the Drug Act communicate dramatically the concerns that prompted the enactment of § 6(*l*)(6) and the other provisions of the Drug Act:

> (1) the Federal Government has a duty to provide public housing that is decent, safe, and free from illegal drugs;
>
> (2) public housing projects in many areas suffer from rampant drug-related crime;
>
> (3) drug dealers are increasingly imposing a reign of terror on public housing tenants;
>
> (4) the increase in drug-related crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures; and
>
> (5) local law enforcement authorities often lack the resources to deal with the drug problem in public housing, particularly in light of the recent reductions in Federal aid to cities.

Anti-Drug Abuse Act of 1988, § 5122, 102 Stat. at 4301.

the House, the Drug Act was assembled through the efforts of ten committees.[10] Although the version of the Drug Act as passed by the House on September 22, 1988, contained several provisions relating to drug activity in public housing, it did not contain the eviction provision that later became section 5101 of the Drug Act.[11]

The House-passed bill was amended on the Senate floor, and the eviction provision was added to the bill as part of a substitute amendment to the House-passed bill offered on October 13, 1988, by the majority leader, Senator Byrd.[12] A compromise between the House and Senate versions of the bill

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[10] The House-passed bill, H.R. 5210, headed ten titles of the bill by the Committee with jurisdiction over the provisions in the title: Title I – Committee on Banking, Finance and Urban Affairs; Title II – Committee on Education and Labor; Title III – Committee on Foreign Affairs; Title IV – Committee on Government Operations; Title V – Committee on Interior and Insular Affairs; Title VI – Committee on the Judiciary; Title VII – Committee on Merchant Marine and Fisheries; Title VIII – Committee on Public Works and Transportation; Title IX – Committee on Ways and Means; Title X – Committee on Energy and Commerce. *See* Omnibus Drug Initiative Act of 1988, H.R. 5210, 100th Cong. (1988).

[11] Omnibus Drug Initiative Act of 1988, H.R. 5210, 100th Cong. (1988). *See also* 134 Cong. Rec. 24,925 (Sept. 22, 1988) (House passes H.R. 5210).

[12] The Byrd amendment consisted of the text of S. 2852, introduced on October 3, 1988, by Senator Nunn, with 50 cosponsors. *See* 134 Cong. Rec. 30,207, 30,326 (Oct. 13, 1988) (text of Byrd Amendment No. 3677, Omnibus Anti-Substance Abuse Act). The Senate substitute bill for HR 5210, which included the Byrd substitute as well as numerous amendments, was passed on October 14, 1988. *See* 134 Cong. Rec. 30,826 (Oct. 14, 1988).

was informally reached, and it was approved by the House on October 21, 1988, and by the Senate on the same day.[13]

Because of the expeditious movement of the bill to enactment, a formal conference and conference report were not pursued. A statement and summary of the public housing provisions was provided on the House floor on October 21, 1998, by Congressman Chalmers Wylie, the ranking minority member of the Committee on Banking, Finance and Urban Affairs.[14] In the Senate, Senator Joseph Biden, chairman of the Judiciary Committee, inserted in the Congressional Record an analysis of the provisions of the Drug Act under the jurisdiction of the Judiciary Committee, including forfeiture provisions allowing public housing units to be seized from tenants who violate drug laws.[15] The analysis also covered the public housing eviction provision. Senator Biden said that it is "important for there to be a detailed statement in the RECORD of Congress' intent in enacting these provisions."[16]

The analysis stated that the eviction provision, section 5101 of the Drug Act, "codifies current HUD guidelines granting public housing agencies authority to evict tenants if they, their families, or their guests engage in drug-related criminal activity."[17] On August 30, 1988, HUD had published comprehensive final regulations on public housing lease

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[13] 134 Cong. Rec. 33,147, 33,318, 32,630, 32,678 (Oct. 21, 1988).

[14] 134 Cong. Rec. 33,149 (Oct. 21, 1988) (statement of Congressman Wylie describing the lease and eviction provision as confirming the legal authority of PHAs to evict a tenant for drug-related criminal activity of the tenant, a member of the tenant's household, or a guest or other person under the tenant's control).

[15] 134 Cong. Rec. 32,692 (Oct. 21, 1988).

[16] *Id.*

[17] *Id.*

provisions and termination of tenancy.[18] It is reasonable to assume that the guidelines mentioned by Senator Biden refer to these regulations. At the time of Senator Biden's comments, the HUD regulations treated the illegal acts of household members and of guests or other persons in separate provisions.[19] These provisions made it clear that if a household member committed a violent crime or conducted illegal drug activity, the tenancy of the entire family could be terminated.[20] Similarly, a tenant and

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[18] Tenancy and Administrative Grievance Procedure for Public Housing Final Rule, 53 Fed. Reg. 33,216 (Aug. 30, 1988). After Congressional review of the regulation, it was made effective on November 7, 1988. 53 Fed. Reg. 40,221 (Oct. 14, 1988). However, HUD withdrew the notice of effective date, 53 Fed. Reg. 44,876 (Nov. 7, 1988), after a temporary restraining order was issued in an action brought by the National Tenants Organization in the District Court for the District of Columbia. After a preliminary injunction was issued by the court on January 25, 1989, because of questionable provisions in the regulations involving grievance procedures, *National Tenants Org. v. Pierce*, No. 88-3134 (D.D.C. Jan. 25, 1989), HUD withdrew the final rule. 54 Fed. Reg. 6,886 (Feb. 15, 1989).

[19] 53 Fed. Reg. 33,306 (Aug. 30, 1988). Section 966.10(i) of these regulations provided with respect to household members:

> (i) Crime. (1) In addition to the provisions required by § 966.10(h)(2)(iii), the lease may provide that any of the following criminal activities by any Household member, on or off the premises, shall be a violation of the lease, or other good cause for termination of tenancy:
> (i) Any crime of physical violence to persons or property.
> (ii) Illegal use, sale or distribution of narcotics.

The relevant provision for guests and other persons was contained in section 966.10(h)(2)(iii), which stated that the lease should provide that the tenant and other members of the household:

> (iii) Shall not engage in criminal activity in the dwelling unit or premises, and shall prevent criminal activity in the unit or premises by guests, visitors, or other persons under control of Household members....

[20] 53 Fed. Reg. 33,227-33,228 (Aug. 30, 1988) (the preamble to the final regulations stated, with respect to household members, that: "the final rule adds a new provision (§ 966.10(i)(1)) authorizing the PHA to include a

any household members who invited guests, visitors or other persons into the unit or onto the premises were responsible for the criminal acts of these persons and their tenancy could be terminated because of the illegal acts of these persons.[21]

The intent of Congress in framing and enacting section 5101 of the Drug Act, according to Senator Biden, one of the Drug Act's managers, is similar to the policy expressed in the contemporaneous preamble and regulations promulgated by HUD, and that policy would permit the eviction of a tenant for violent criminal or unlawful drug activities of any household members and such actions by any invited guests or other persons under the control of the tenant or a household member.

Further confirmation on the meaning of section 5101 of the Drug Act occurred the following year in response to HUD's waivers of the time-consuming administrative grievance hearings prior to eviction in favor of direct access to state courts by a PHA wishing to terminate a tenancy.[22] A provision not in

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lease provision allowing eviction of a family for two categories of on-site or off-site criminal activity by a family member…").

[21] *Id.* at 33, 229. The preamble to the final rule stated:

> The final rule contains a single uniform formulation of the tenant's contractual responsibility for third party acts. The tenant and other members of the household must "prevent" disturbance, damage or illegal acts by "guests, visitors, or other persons under control of Household members"… The tenant should only be responsible for acts by guests or visitors (i.e., persons who enter the unit with the consent of the household), or by other persons under control of the household.

The preamble gives one example of a person not under control of the tenant – a burglar who breaks into the unit.

[22] *Drugs in Federally Assisted Housing: Hearing on S. 566 Before the Subcomm. on Hous. and Urban Affairs of the Senate Comm. on Banking, Hous. and Urban Affairs*, 101st Cong. 8, 75 (July 20, 1989) (statement of Wade J. Henderson, Associate Director, American Civil Liberties Union, Washington, D.C.).

either House or Senate bill was added in conference to a supplemental appropriations bill, enacted on June 30, 1989, which prohibited such waivers where the PHA wished to evict household members who were not involved in the drug-related criminal activity of another household member.[23] The right of a PHA to evict "innocent" household members pursuant to section 5101 of the Drug Act was implicit in Congress' adoption of this limiting amendment. As soon as wider awareness of this provision occurred, the Administration and Members of Congress reacted strongly to the 1989 law, with Congressman Wylie, ranking member of the House Committee on Banking, Finance and Urban Affairs, complaining on the House floor that the amendment, among other things, "prohibits evictions of any other household member who is not involved in such drug-related criminal activity."[24] Congress moved quickly to repeal the provision and it was repealed in the law making appropriations for HUD in FY 1990, which was enacted on November 9, 1989.[25] The Senate Committee Report on this bill states crisply that the repeal of this provision "is necessary to permit expeditious and effective response to drug-related

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[23] Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. No. 101-45, § 404(b), 103 Stat 97, 128 (June 30, 1989). Section 404(b) read:

> (b) Upon conclusion of the review mandated by subsection (a), if the Secretary determines that due process standards are met for a jurisdiction, the Secretary shall issue that jurisdiction a waiver of the procedures required in section 6(k) of the United States Housing Act of 1937, 42 U.S.C. 1437d(k), for evictions involving drug-related criminal activity which threatens the health and safety of other tenants or public housing authority employees as long as evictions of a household member involved in drug-related criminal activity shall not affect the right of any other household member who is not involved in such activity to continue tenancy.

[24] 135 Cong. Rec. H3942 (daily ed. July 19, 1989) (statement of Rep. Wylie).

[25] Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-144, Title II - Administrative Provisions, 103 Stat. 839, 853 (Nov. 9, 1989).

criminal activity in public housing units."[26]

Further efforts were made to mitigate the impact of section 5101 of the Drug Act on innocent persons in H.R. 1180, the proposed "Housing and Community Development Act of 1990". As approved by the House Subcommittee on Housing and Community Development on May 10, 1990, the bill contained a provision requiring PHAs, in determining whether to terminate tenancy because of criminal activity, to consider the "effects that eviction or termination would have on any family members not aware of or involved in the criminal activity...."[27] This provision was eliminated by an amendment during mark-up by the full Banking Committee, and instead language almost identical to the language stricken from the bill was inserted in the House Committee Report.[28] The only remnant of the effort during 1989 and 1990 to temper the effect of section 5101 on innocent tenants through statutory provisions

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[26] S. Rep. No. 101-128, at 60 (Sept. 13, 1989).

[27] HOUSE COMM. ON BANKING, FIN. AND URBAN AFFAIRS, 101ST CONG., SHOWING H.R. 1180 AS REPORTED BY THE SUBCOMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT ON MAY 10, 1990 (Comm. Print May 21, 1990). Section 503(a) of H.R. 1180 provided in part:

> In any instance of criminal activity, in determining action with respect to eviction or termination, the agency shall consider all of the circumstances of the particular case known to the agency, including the seriousness of the offense, the extent of knowledge or participation by family members, the effects that eviction or termination would have on any family members not aware of or involved in the criminal activity, and the impact on the rights or safety of other tenants or employees of the public housing agency.

[28] H. R. Rep. No. 101-559, at 34 (June 21, 1990) (H.R. 1180, as reported on June 21, 1990, no longer contained the language in § 503 quoted in the immediately preceding footnote.) Judge Breyer's district court opinion alluded to failed attempts to obtain the enactment of an innocent tenant defense when it acknowledged the assertion of the defendants that "the authors of the Senate report cited by the plaintiffs simply did not prevail in their attempts to include language in the statute which would have protected 'innocent' tenants." *Rucker v. Davis*, No. C 98-00781 CRB, 1998 U.S. Dist. LEXIS 9345, at *17, (N.D. Cal. June 19, 1998).

was the precatory language of the House Committee Report and of the Senate Committee Report on its version of 1990 housing legislation.[29] The statement in the 1990 Senate Committee Report relied upon by the lower court as relevant legislative history is not legislative history with respect to the innocent tenant issue before this court, but is merely the expression by a Committee of one body of Congress as to what would be an appropriate implementation of a law enacted by a previous Congress.[30]

II. ASSUMING, *ARGUENDO*, THAT THE NINTH CIRCUIT PROPERLY CONSULTED NONCONTEMPORANEOUS LEGISLATIVE STATEMENTS, IT ERRED IN FAILING TO CONSIDER ALL RELEVANT EVIDENCE OF CONGRESSIONAL INTENT.

Amici curiae urge that if inquiry into legislative statements subsequent to the original enactment of the statutory language in question is permitted, it should not be selective. The court did not mention, for example, that, in addition to the Senate report relied upon as indicative of congressional intent, a conference report was also issued for the 1990 Act. This report – which must be considered the dispositive explanatory

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[29] S. Rep. No. 101-316, at 179 (June 8, 1990). The House bill as reported or passed did not contain a similar provision as the Senate bill which revised somewhat the language enacted in 1988 in section 5101 of the Drug Act. *See* H.R. Conf. Rep. No. 101-943, at 418 (Oct. 25, 1990) (Joint Explanatory Statement of the Committee of Conference).

[30] S. Rep. No. 101-316, at 179 (June 8, 1990). The Report states:

> This section would make it clear that criminal activity, including drug related criminal activity, can be cause for eviction only if it adversely affects the health, safety, and quiet enjoyment of the premises. The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

document issued for the entire Congress concerning the 1990 Act – does not contain the Senate report language relied upon by the court below. Although it states that criminal activity "engaged in by a public housing tenant, any member of the tenant's household, or any guest [*sic*] or other person under the tenant's control, shall be cause for termination of tenancy", it makes no mention of an innocent tenant defense. The text of the pertinent conference report language is set forth in full in the Appendix (App. 9a).

Additionally, since 1990, Congress has legislated several times with respect to control of illegal drugs and crime in public housing.[31] Yet, on none of these occasions has it seen fit to enact an innocent tenant defense, notwithstanding its awareness of HUD's interpretation that no such defense exists under the statute. This is "persuasive evidence that the interpretation is the one intended by Congress." *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

A direct post-1990 expression of Congressional intent to authorize the removal of entire households from public housing because of the criminal activity of individual members of the household is found in § 577(a) of the Quality Housing and Work Responsibility Act of 1998 (QHWRA). That section provides that:

> a public housing agency . . . shall establish standards or lease provisions for continued assistance or occupancy . . . that allow the agency . . . to terminate the tenancy or assistance for any household with a member – [who is illegally using drugs or whose abuse of drugs or

[31] Section 9(a)(2), Housing Opportunity Program Extension Act of 1996, note 6, *supra*. The most substantial legislation addressing illegal drugs, alcohol abuse and crime in public housing and other assisted housing was enacted in Subtitle F (§§ 575-579) of the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, §§ 575-579, 112 Stat. 2518, 2634-2643 (1998). Other isolated provisions addressing methamphetamine production in public housing and fleeing felons and probation or parole violators were also enacted during the post-1990 period.

> alcohol may constitute a threat to other residents].

QHWRA, § 577(a), 112 Stat. at 2640-41 (emphasis added).

This language clearly indicates an intent of Congress to permit the removal of entire households from public housing based on the drug or alcohol abuse on the part of individual household members. A contrary congressional intent with respect to other, often more serious, drug-related or other criminal activity is highly unlikely. An intent to hold the entire household responsible for the actions of its members is also seen in other QHWRA provisions relating to admission.[32] A contrary construction of § 6(*l*)(6) would contradict the clear intent of these provisions and would undermine their effectiveness. These provisions and other post-1988 enactments relating to exclusion and removal from public housing of families whose household members engage in criminal misconduct should be read as a consistent whole. When they are, they reveal a conscious long-term congressional policy directly contrary to that found by the Ninth Circuit. Congress intended in the plain language it enacted in 1988 to hold tenants responsible for the criminal misconduct of members of their household and their guests, and it has remained of that mind.

III. THE COURT BELOW ERRED IN FAILING TO DEFER TO THE DEFINITIVE INTERPRETATION OF THE STATUTORY LANGUAGE BY THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD).

[32] Similar language in QHWRA § 576(b) prohibits admission "*for any household with a member*" who the PHA determines is using a controlled substance or who has a pattern of abuse of alcohol that may threaten others. QHWRA, § 576(b), 112 Stat. at 2639 (italics added). QHWRA § 576(c) similarly provides that if a PHA determines that "*an applicant or any member of the applicant's household*" was engaged in certain types of criminal activity during a reasonable period preceding the application, then the PHA may deny "*such applicant*" (*i.e.*, the entire household) admission to the program. QHWRA, § 576(c), 112 Stat. at 2640 (italics added).

The meaning ascribed by the Ninth Circuit to Housing Act § 6(*l*)(6) directly contradicts the conclusions reached concerning this language by HUD, the federal department directly charged with implementing the Housing Act.

The HUD regulations implementing § 6(*l*)(6) at the time this action arose were promulgated in a final rule, entitled "Public Housing Lease and Grievance Procedures," published October 11, 1991. 56 Fed. Reg. 51,560. The applicable portions of the regulations, codified at 24 C.F.R. §§ 966.4(f)(12) and 966.4(*l*)(2)(ii) (2001), closely follow the statutory language. (App. 5a). The preamble to the 1991 rule, which is set forth in pertinent part in the Appendix (App. 1a-4a), makes it clear that HUD did not interpret the statute as containing an innocent tenant defense. To the contrary, the preamble states unequivocally that the tenant's obligation to assure that household members and guests do not engage in criminal activity is a direct contractual obligation, not the imposition of vicarious liability.

> The statute and regulation are based on a different, simpler and more practical test, whether a household member has in fact committed the criminal activity. In terminating tenancy for this reason, the PHA enforces the tenant's contractual duty, expressed in the lease, to prevent such activity by any family member.

56 Fed. Reg. 51,567 (Oct. 11, 1991).

In the preamble, HUD noted but rejected suggestions by legal aid and tenants' organizations that tenants "should not be required to 'assure' the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by members of the household." HUD also disregarded comments urging that:

> the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant had done everything "reasonable" to control the criminal activity. 56 Fed. Reg. 51,566 (Oct. 11, 1991).

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court held that, unless Congress has expressed a clear intent to the contrary, the interpretation of a statute by an agency charged with enforcing it must be upheld if it is a permissible construction of the statute. Where Congress has not spoken directly to "the precise question at issue" the court "does not simply impose its own construction on the statute." *Id.* at 843.

> Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . "The power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."

Id. (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).[33]

The court below avoided the deference to HUD regulations that *Chevron* requires, by concluding that "Congress had an intention on the precise question at issue that is contrary to HUD's construction . . . ." *Rucker*, 237 F.3d at 1119. In light of the entire legislative record discussed *supra*, however, such a conclusion seems almost preposterous. At worst, § 6(*l*)(6) is

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[33] Nor is there any question that the full deference required by *Chevron* is mandated, since HUD's interpretation was promulgated in a formal notice and comment rulemaking process pursuant to statutory rulemaking authority. *See United States v. Mead Corp.*, 533 U.S. 218 (2001) (discussing lesser deference accorded to agency interpretations developed without notice and comment rulemaking).

silent concerning an innocent tenant defense. In such a circumstance, HUD's interpretation must control, unless the statutory language simply does not support that interpretation.[34]

In *Chevron*, the Court indicated that the applicable standard for determining whether a regulation is "permissible" depends upon whether there was an express or implied delegation to the agency. *Chevron*, 467 U.S. at 843-44. In the former case, "the agency's regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute." *Id.* In the latter case, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*[35] In view of the plain meaning of the statutory language, the acknowledged seriousness of the drug and crime problems in public housing, the well-reasoned explanation of HUD's interpretation of § 6(*l*)(6) as set forth in the 1991 rule preamble (App. 1a-4a), and the weight of evidence indicative of legislative intent supporting HUD's interpretation of the statute, the applicable HUD regulations easily satisfy either of these tests.[36] HUD has acted rationally and reasonably in its

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[34] "The court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question had initially arisen in a judicial proceeding." *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (quoting *Chevron*, 467 U.S. at 843, n 11).

[35] What constitutes a "permissible" construction has been variously defined. *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (a "permissible" construction of a statute is one that is "rational and consistent with the statute").

[36] The language of 42 U.S.C. 1437d(c)(4)(A)(iii), as it existed when this action arose, also supports HUD's interpretation that § 6(*l*)(6) does not contain an innocent tenant defense. That section, which imposed certain mandatory preferences for admission to public housing, contained an exception for "any individual or family evicted by reason of drug-related criminal activity." However, it allowed the HUD Secretary to waive this disallowance of preference for "any member of a family of an individual prohibited from tenancy under this clause who the agency determines clearly did not participate in and had no knowledge of such criminal activity...."

regulations. The principles of *Chevron* thus demand reversal of the decision under review.[37]

IV. THE INTERPRETATION OF § 6(*l*)(6) BY THE COURT BELOW MISCONCEIVES THE NATURE OF STATE LAWS UNDER WHICH PUBLIC HOUSING EVICTIONS PROCEED

The Ninth Circuit's interpretation of § 6(*l*)(6) also misconceives the substance of state laws under which public housing evictions occur. The court was troubled that "[a]lthough the statute permits 'termination of tenancy,' it does not answer the question of *whose* tenancy." *Rucker*, 237 F.3d at 1120. In situations with multiple tenants, the court asked, did the statute authorize eviction of the offending party only, or of all persons on the lease? *Id.* Congress has, in § 6(*l*) of the Housing Act, enacted certain special requirements for public housing leases, but it has never elected to create a federal landlord and tenant law for eviction (dispossessory) proceedings. Thus, although public housing evictions involve administrative notice and grievance procedures specified in federal regulations, virtually all such evictions, like those in the case under review, proceed judicially under state unlawful detainer statutes or landlord-tenant acts. Under these statutes the question of "whose tenancy" is irrelevant because the action is for *possession of the real property* not the ejection of specific household members. Indeed, the removal of particular persons from leasehold premises is not a remedy available under these

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The provision would be meaningless if innocent tenant evictions were not permitted. (Congress repealed the mandatory preferences, and with them this provision, in 1998.)

[37] The United States Court of Appeals, Eleventh Circuit, agrees with HUD and the *amici curiae* that § 6(*l*)(6) does not contain an innocent tenant defense and that HUD's interpretation of the statute is controlling. On November 7, 2001, a three-judge panel of that court ruled *inter alia*; "Because we find the statute to be clear on its face, HUD's interpretation is the only permissible construction of the statute." *Burton v. Tampa Hous. Auth.*, No. 00-13607, 2001 U.S. App. LEXIS 24043 (11th Cir. Nov. 7, 2001).

statutes.[38] This common characteristic of state landlord-tenant and unlawful detainer statutes - most of which have been in existence for many decades - must be presumed to have been known to Congress as it considered matters involving evictions from public housing.

V. THE DECISION OF THE COURT BELOW IGNORES THE PRACTICAL REALITIES SURROUNDING EFFORTS BY PHAs TO CONTROL ILLEGAL DRUGS AND CRIME IN PUBLIC HOUSING DEVELOPMENTS

The Ninth Circuit's decision ignores the realities associated with enforcement of PHA policies for the control of illegal drugs and crime in public housing developments. The decision under review would, where the criminal activity occurs outside the unit, require a showing that the perpetrator is under the tenant's control with respect to the commission of the offense, or that the tenant participated in or had prior knowledge of the offense. Such a showing will generally be possible only in the limited, and highly unlikely, circumstance in which the tenant is caught in the act of observing an offending household member or guest commit the offense.[39]

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[38] The overwhelming majority of state landlord tenant and unlawful detainer laws contemplate only actions for recovery of possession of the real property. In a survey of the state landlord tenant and unlawful detainer statutes, *amici curiae* found only one, the Oklahoma landlord and tenant law, which provides for the eviction of individual occupants. OKLA. STAT. tit. 41, § 117 (2000). The laws of some states adopting variants of the Uniform Residential Landlord and Tenant Act contain a general right on the part of landlords to injunctive relief to enforce rights. Because of the burden that must be carried by a party seeking such relief, however, this remedy cannot be considered practicable. Pennsylvania has adopted the Model Expedited Eviction of Drug Traffickers Act, which permits partial evictions, although the state's landlord and tenant law does not permit them. *Amici curiae* noted that at least three states - Illinois, North Carolina and Tennessee - have statutes that specifically address eviction for criminal activity or conviction; however, none of these contemplate partial evictions.

[39] The HUD regulations in effect at the time this action arose (App. 5a) implicitly assume that the requirement for "control" applies only to "other persons" and not to household members or guests. The current regulations, promulgated in the May 24, 2001 final rule, to be codified at 24 C.F.R. § 5.100, make this distinction explicit. They define *other person under the tenant's control*, for purposes of the Part 966 Public Housing Lease and Grievance regulations and certain other regulations, as a person who, although not staying in the unit as a guest, is present on the premises [the unit or development] "because of an invitation from the tenant or another member of the household who has express or implied authority to so consent on behalf of the tenant." The definition goes on to state that a person "temporarily and infrequently on the premises solely for legitimate commercial purposes is not under the tenant's control." HUD's determination concerning the meaning of the word "control" is entitled to *Chevron* deference. 66 Fed. Reg. 28,791 (May 24, 2001).

Whether a tenant has knowledge or control with respect to a particular incident of criminal activity committed by a household member or guest is usually known only to the tenant. PHAs have no power to conduct in-unit surveillance or custodial interrogations. Proof of a tenant's knowledge or participation in any situation where the tenant is not physically present at the time of the offense will generally be impossible from a practical standpoint. Similarly, a PHA has little or no means practically available to it to rebut self-serving declarations that a tenant had imposed strict household rules forbidding drug use or other criminal behaviors, and, absent a pattern of criminal activity that results in a documented record, the PHA usually has no available means to proving by inference that the criminal act of a household member was foreseeable. Even where a court recognizes a rebuttable presumption of the tenant's knowledge or control, the PHA will generally not possess effective means to refute statements of tenants and other household members denying knowledge or control. The usefulness of such a presumption, in arriving at the truth, is thus largely illusory.

As mentioned *supra*, the HUD regulations require no such proofs because they are based on a more practical contractual standard. This approach is the only one that is practicable. Judicial refusal to recognize that the obligations of the tenant are contractual virtually guarantees that crime and drugs will be out of control in many public housing

developments.[40]

The imposition of an innocent tenant defense in public housing is also especially problematical because of the character of public housing leases. Public housing leases differ fundamentally from private sector residential leases because they are "endless." The Housing Act provides that, so long as tenant families have complied with applicable community service requirements, their public housing leases are automatically renewed. 42 U.S.C. §1437d(*l*)(1). Public housing leases thus continue indefinitely, terminating only for a breach of the lease as described in § 6(*l*) of the Housing Act.

The automatic renewal of public housing leases renders unavailable to providers of public housing the most efficient remedy for ridding private sector residential developments of anti-social or otherwise undesirable tenant families - that of simple nonrenewal of lease. The federal regulatory regime thus impels public housing agencies to resort to eviction, or the credible threat of it, as the principal means of removing criminal elements from their developments. Ironically, private sector housing providers, who least need the remedy of eviction, do not usually face an innocent tenant defense. *Rucker dissent*, 237 F.3d at 1137. Yet, if the ruling below stands, public housing agencies will be subject to such a defense, in spite of the fact that a tenant's right of continued occupancy under the "endless lease" leaves PHAs with little choice but to evict, or credibly to threaten eviction, if they are to control illegal drugs and crime in their developments. Considering the serious illegal drug and crime problems plaguing many public housing developments, removal of the PHA's ability to evict the entire household is destructive to safe public housing

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[40] Eviction of families for the actions of a household member or guest is a significant tool used by PHAs to reduce crime and drug activity in public housing projects. In a survey of PHADA members, 204 PHAs responded, primarily small PHAs (average number of public housing units of respondents was 381), and indicated that from 1998, 1735 evictions involving the acts of household members and guests occurred.

environments.[41]

Finally, the credible threat of eviction is vital to the ability of PHAs to persuade tenants to agree to the removal and bar of offending household members or guests in lieu of eviction. This action is in many cases the only practicable alternative to evicting the entire household.[42] Although HUD regulations allow PHAs to condition continued occupancy on the exclusion of a household member who has "participated in or been culpable for action or failure to act that warrants termination"[43] refusal of the tenant to agree to removal and bar is not a ground for termination of tenancy explicitly authorized in the Housing Act.[44] Thus, as a practical matter, the use of removal and bar is dependent upon the tenant's agreement, motivated by the perception that the PHA has the authority to

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[41] Each instance in which a person engaging in criminal activity remains in public housing reduces in some measure the ability of the PHA to fulfill its promise to provide safe and secure housing. Recent experience with crime control in inner city environments has included an emphasis on eliminating the appearance of crime, including so-called "life-style crime" that may give both law-abiding persons and criminals impressions that the neighborhood is out of control. This is sometimes referred to as the "Broken Windows" theory of law enforcement. *See* WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC (Random House N.Y. 1998) 138-39, 152, 228 *et seq*. Indeed, evidence that uncontrolled social environments can and have resulted in the complete failure of public housing developments is seen in the widely reported decisions to abandon and demolish public housing projects in Chicago and other cities.

[42] A survey of its members by *amicus curiae*, CLPHA, revealed that 19 of 21 agencies responding to the inquiry (90.5%) stated that they employed removal and barring of individual household members or guests as a measure short of eviction. (One of the respondents barred only guests.) Respondents represented approximately 91,700 units of public housing.

[43] 66 Fed. Reg. 28,803 (May 24, 2001) (to be codified at 24 C.F.R. § 966.4(*l*)(5)(vii)(C)). At the time this action arose, the regulation contained different language to the same effect in 24 C.F.R. § 966.4(*l*)(5) (App. 6a).

[44] The enforceability of lease provisions calling for removal and bar of household members, where such provisions exist, is presently unclear.

evict the entire household unless the removal and bar is accepted. Voluntary agreement on the tenant's part is necessary for the additional reason, noted *supra*, that state unlawful detainer statutes do not generally contemplate or allow an action to remove individual household members. A tenant who is aware that the court will not evict the entire household will not feel compelled to cooperate with the PHA in removing and barring household members and guests who engage in criminal activity. The decision of the Ninth Circuit, if sustained, will render illusory the useful remedy of removal and bar as an alternative to eviction.

VI. IMPOSING RESPONSIBILITY ON THE TENANT FOR ASSURING THAT MEMBERS OF THE HOUSEHOLD AND GUESTS WILL NOT ENGAGE IN CRIMINAL ACTIVITY IS NOT UNREASONABLE OR "ODD AND ABSURD."

In enacting Housing Act § 6(*l*), Congress conferred upon the PHAs the authority, but not the obligation, to terminate public housing tenancies upon occurrence of a lease default allowed under the statute.[45] Given that a lease violation has occurred, whether or not action will be taken to evict rests within the discretion of the PHA. Even where, as here, an unlawful detainer action has been filed, it is the PHA that determines whether to pursue it or to settle with an accommodation in lieu of eviction. HUD's 1991 lease and grievance regulations, as codified at 24 C.F.R. § 966.4(*l*)(5) (2001) (App. 6a), and its recent regulations implementing the post-1990 legislation affecting termination of public housing tenancies both reflect this discretionary authority.[46] It is clear that the discretion to which HUD's regulations refer resides with

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[45] Section 6(*l*)(6) does not require a PHA to evict. It only requires public housing leases to provide that certain behaviors on the part of a tenant, any member of tenant's household, a guest or other person under the tenant's control *shall be cause for* eviction. 42 U.S.C. § 1437d(*l*)(6).

[46] HUD's final rule entitled "Screening and Eviction in Public and Assisted Housing," published May 24, 2001 redesignated and restated this section, without substantive change. 66 Fed. Reg. 28,803 (May 24, 2001). The new language is set forth in full in the Appendix (App. 7a-8a).

the PHA, not the reviewing court.[47]

Notwithstanding the public rhetoric of the One-Strike and You're Out Initiative, PHAs are not, and have never been, required to evict in every instance where a lease may be violated. In responding to a comment addressing the nature of PHA discretion in the preamble to its May 24, 2001 final rule, HUD stated, in pertinent part, as follows:

> [I]nsofar as PHAs possess discretion to determine for themselves when to initiate eviction proceedings, they are neither required by law nor encouraged by HUD to terminate leaseholds in every circumstance in which the lease would give the PHA grounds to do so...[T]hese points are already inherent in the regulatory language.[48]

In this respect, the Ninth Circuit, whose opinion is overtly reactive to the federal One-Strike Initiative,[49] misunderstood the policy. While One-Strike did mandate PHA policies requiring the exclusion of certain *applicants*, it effectuated no substantive legal change regarding PHA discretion in terminating

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[47] *See Minneapolis Public Hous. Auth. v. Lor*, 591 N.W.2d 700 (Minn. 1999) The discretionary decision of the PHA should thus not be disturbed unless arbitrary, capricious, unsupported by substantial evidence, or abusive to such an extent as to amount to an error of law. *Clark v. Alexander*, 85 F.3d 146 (4th Cir. 1996).

[48] 66 Fed. Reg. 28,783 (May 24, 2001).

[49] In the preamble to its opinion, the court described the policy as one "which encourages evictions regardless of circumstances" and, in describing the facts, began by stating that "[b]ecause of the increased enforcement under the 'One-Strike' policy, we are now beginning to see exactly how far-reaching HUD's interpretation of § 1437d(*l*)(6) can be." *Rucker*, 237 F.3d at 1117.

established tenancies.[50]

PHA discretion is important because it bears upon the issue of fairness. Courts construing § 6(*l*)(6) as containing an innocent tenant defense have sought to assure fairness categorically by limiting the range of discretion otherwise residing with the PHAs under the regulatory scheme. *Amici curiae* urge, however, that it is the PHAs that are best situated to make decisions concerning the appropriateness of eviction in individual cases. It is they who are charged by the federal government with the responsibility for maintaining safe public housing environments, and it is they who are accountable to their residents and local government officials if they fail to do so. Moreover, achieving "fairness" is a matter of considerable complexity. The decision whether to evict often involves an array of factors affecting not only the family but the entire community of public housing residents. A PHA might, for example, legitimately consider the severity and trending of crime problems in the tenant's development, the effect the decision will have as precedent for other residents, the perceptions of residents concerning safety and security, or the potential for intimidation of others by household members or guests involved in criminal activity. Sometimes the decision will involve questions of judgment to which there is no clear answer, such as the likelihood that a family member who is removed and barred (in lieu of evicting the entire household) will return. Only some of the myriad factors potentially affecting a decision to evict have to do with fairness to the individual tenant, and among these, only some are properly considered by a court hearing an unlawful detainer case. Such a court will generally have no knowledge, for example, of the family's record of past behavior with the PHA except where the

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[50] The HUD pamphlet promulgating the One-Strike Initiative in 1996 itself made clear that, while HUD urged PHAs to consider strict lease provisions providing for zero tolerance regarding drugs and crime, the election when and where to enforce those provisions in particular cases remained within the discretion of the PHAs. *"One Strike and You're Out" Policy in Public Housing*, 7-8 (March 1996) transmitted by HUD Notice PIH 96-16 (April 12, 1996).

ground for eviction is that of repeated lease violation.

Judicial focus in public housing evictions solely or primarily upon the perceived hardship to individual defendants represents an incomplete view of the equities involved. Refusal to allow the removal of an entire household ignores the disastrous effect that drug-related and serious violent criminal behavior has upon other public housing residents. It also ignores the reality that the retention of a family in public housing whose members commit crimes has the likely effect of excluding another equally needy, noncriminal family on the waiting list[51] whose unmet housing needs do not differ from those of the household that is evicted for criminal activity.[52] If evicted, an innocent tenant will face a situation no worse than that of the next family on the waiting list.[53]

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[51] During debate in the House on H.R. 5210, the ranking minority member of the Subcommittee on Housing and Community Development, Rep. Marge Roukema, stated:

> At a time when we have long waiting lists of law-abiding citizens who hope to receive housing assistance, it makes no sense to allow even a single unit of assisted housing to be occupied by a criminal who preys on others in housing projects and their neighborhoods. It's a tough approach, but one which sends a clear message that "There is a cost to using drugs."

134 Cong. Rec. 22,630 (Sept. 7, 1988).

[52] The recent emphasis on background screening in admissions to public housing to eliminate households with members having unsavory backgrounds presumably makes it less likely that the next family to occupy the unit will engage in criminal activity. To assist in this process, Congress enacted legislation in 1996 granting to PHAs the right to obtain criminal background information on applicants for public housing. *See* Housing Opportunity Program Extension Act, § 9(b), note 6 *supra*. In 1998, it also mandated the exclusion of any household with a member who is an active user of illegal drugs or a person with a pattern of alcohol abuse that may threaten others. *See* QHWRA, § 576(b), note 32 *supra*.

[53] Advocates and some courts have seen hardship in what they perceive as a certainty that households evicted from public housing will become "homeless." HUD has no data that confirm or deny this assertion, although

Finally, the innocent tenant is not more innocent than a household member, often a minor or elderly member of the household, who is evicted because the *tenant* himself or herself has engaged in criminal behavior. Yet in these instances, no question is raised concerning the propriety of removing the entire family.

As the dissent in the court below acknowledged, unlike federal benefit programs such as Food Stamps, federal housing benefits have never been an "entitlement" under which all income-eligible persons have a right to housing assistance. To the contrary, it has been estimated that, nationwide, the assistance available under federal housing assistance programs is sufficient to serve only *25 percent* of the persons who are eligible for such assistance.[54] The scarce resource that is public housing ought to be reserved for families whose members do not engage in crimes.

Congress and HUD have reasonably determined that, ultimately, someone must be responsible for the criminal behavior of household members and guests, and that someone must be the person responsible for introducing those engaging in criminal misconduct to the public housing community. The Ninth Circuit should not have substituted its views for those clearly expressed by the coordinate branches of government.

CONCLUSION

The decision of the Ninth Circuit under review should be reversed.

November 20, 2001

PHAs report anecdotally that true homelessness, in the sense that the family is forced to reside in the streets, is not a common consequence of public housing evictions.

[54] Kingsley, *Federal Housing Assistance and Welfare Reform: Uncharted Territory*, The Urban Institute, New Federalism - Issues and Options for States, Series A, No. A-19 (Dec. 1997) at 2.

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APPENDIX

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Excerpt, HUD 1991 Public Housing Lease and Grievance Rule Preamble (56 Fed. Reg. 51,566-67)

3.3 *Eviction For Criminal Activity*

3.3.1 Crime By Household Member

Federal law provides that certain categories of criminal activity by a public housing household member are grounds for eviction. A PHA must: "utilize leases which-... provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, *engaged in by ... any member of the tenant's household* ... shall be cause for termination of tenancy ..." (U.S.H. Act, sec. 6(1)(5). 42 U.S.C. 1437d(1)(5)) {emphasis supplied}.

The U.S.H. Act statutory prohibition of criminal activity by a public housing household member was originally enacted in the Anti-Drug Abuse Act of 1988 (section 5101. Pub. L. 100-690. November 18, 1988), and was retained in the 1990 NAHA amendments which redefined the classes of criminal activity to which this prohibition applies (Pub. L. 101-625, section 504, amending section 6(1)(5) of the U.S.H. Act). The proposed and final rule provide that the tenant must assure that members of the household (or guests, or other persons under the tenant's control) do not engage in proscribed criminal activity (§ 966.4(f)(12)(i)).

Comment by legal aid and by tenant organizations asserts that the tenant should not be required to "assure" the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by members of the household. Comment proposes various

possible standards to determine whether the tenant can be evicted for criminal behavior by household members. Comment alleges that the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant has done everything "reasonable" to control the criminal activity. Comment states that under the Constitution a tenant can only be held responsible for activity of a household member within the tenant's control.

PHA comment states that the PHA must be given discretion to evict an entire family for actions of a family member if eviction is in the best interest of other residents. If a PHA lacks clear authority to evict, the PHA may not be able to convince the family to oust a person who engages in criminal activity from the unit.

As in conventional tenancy, a public housing tenant holds tenure of the unit subject to the requirements of the lease, including obligations concerning the conduct of household members affecting the unit, the management of the housing or the welfare of other residents. By signing the lease, a tenant agrees to comply with leasehold requirements pertaining to the behavior of family members. The ability of a PHA or other landlord to enforce covenants relating to acts of unit residents (e.g., damage to a unit, disturbance of other residents) is a normal and ordinary incident of tenancy, and is important for management of the housing. The power of a landlord to evict for the tenant's breach of lease requirements concerning behavior of any member of the household gives the tenant and other occupants a strong motive to avoid behavior which can lead to eviction. If the tenant does not control criminal, or other harmful or disruptive behavior, by unit occupants, the landlord can evict - removing the occupants from the housing. If the landlord does not or cannot evict for such behavior, the

continued presence of the tenant and household may result in harm to the housing or other residents, and the spread of such behavior.

The Congress has determined that drug crime and criminal threats by public housing household members are a special danger to the security and general benefit of public housing residents, warranting special mention in the law. (U.S.H. Act section 6(1)(5). 42 U.S.C. 1437d(1)(5).) For this reason, the Congress specified that these types of criminal activity by household members are grounds for termination of tenancy (without the need for a separate inquiry as to whether such criminal activity constitutes serious or repeated lease violation or other good cause for eviction). The legislative determination by the Congress rests on a reasonable judgement that the potential for a PHA to exercise eviction as a contractual sanction against criminal behavior by unit occupants will promote the welfare of public housing residents in general, and will support the effective management of the housing. Since this judgement is reasonable, and promotes a legitimate public purpose, the legislation is Constitutional under the normal equal protection standard.

There is no reason of Constitutional necessity or public policy for HUD to impose - as proposed by comment - any additional restriction on when the tenancy may be terminated for criminal activity by a household member.

First, as we have already remarked, contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing. The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

Second, if household member criminal activity is

ground for termination, then the tenant has reason to try to control or prevent the activity to protect the tenant's right to continued occupancy by the family. The standards proposed by some of the public comment would allow a variety of excuses for a tenant's failure to prevent criminal activity by household members. The proposed changes would thereby undercut the tenant's motivation to prevent criminal activity by household members.

Third, in practice it will be extremely difficult for the PHA to show that the tenant knew, could have foreseen, could have prevented, or failed to take all reasonable measures to prevent, crime by a household member. In practice, the tenant may have encouraged or profited from the criminal activity or may have ignored or turned a blind eye. The statute and regulations are based on a different, simpler and more practical test, whether a household member has in fact committed the criminal activity. In terminating tenancy for this reason, the PHA enforces the tenant's contractual duty, expressed in the lease, to prevent such activity by any family member. (If a tenant cannot control criminal activity by a household member, the tenant can request that the PHA remove the person from the lease as an authorized unit occupant, and may seek to bar access by that person to the unit.)

Finally, a family which does not or cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.

24 CFR §§ 966.4((f)(12) and 966.4(*l*)(2)(ii)
(1991 Public Housing Lease and Grievance Rule)

(f) The Lease shall provide that the tenant shall be obligated...
(12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
(A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or
(B) Any drug-related criminal activity on or near such premises.

Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

(2) *Grounds for termination...*
(ii) Either of the following types of criminal activity by the tenant, any member of the household, a guest, or another person under the tenant's control, shall be cause for termination of tenancy:
(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the PHA's public housing premises by other residents.
(B) Any drug-related criminal activity on or near such premises.

24 CFR § 966.4(*l*)(5)
(1991 Public Housing Lease and Grievance Rule)

Eviction for criminal activity - (i) PHA discretion to consider circumstances. In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit....

Excerpt, 24 CFR §966.4(f)&(l)
(As revised by May 24, 2001 Final Rule, Screening and Eviction in Public and Assisted Housing)

(f) *Tenant's obligations*. The lease shall provide that the tenant shall be obligated...
(12)(i) To assure that no tenant, member of the tenant's household, or guest engages in:
(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or
(B) Any drug-related criminal activity on or off the premises;
(ii) To assure that no other person under the tenant's control engages in :
(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents, or
(B) Any drug-related criminal activity on or off the premises;
(iii) To assure that no member of the household engages in an abuse or pattern of abuse of alcohol that affects the health, safety, or right to peaceful enjoyment of the premises by other residents.

(*l*) *Termination of tenancy and eviction...*
(2) *Grounds for termination of tenancy.* The PHA may terminate the tenancy only for...
(ii) Other good cause. Other good cause includes, but is not limited to, the following:
(A) Criminal activity or alcohol abuse as provided in paragraph (*l*)(5) of this section...

(5) *PHA termination of tenancy for criminal activity or alcohol abuse.*

(i) *Evicting drug criminals.* (A) *Methamphetamine conviction....*

(B) *Drug crime on or off the premises.* The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy. In addition, the lease must provide that a PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(ii) *Evicting other criminals.* (A) *Threat to other residents.* The lease must provide that any criminal activity by a covered person that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including PHA management staff residing on the premises) or threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises is grounds for termination of tenancy.

Excerpt, H.R. Rep. 101-943, Cranston Gonzalez National Affordable Housing Act, Conf. Rep. to accompany S-566, October 25, 1990 at 418.

Lease requirements: The Senate bill contained a provision not included in the House amendment that amends the prohibited activities under the lease to prohibit criminal activity that adversely affects the health, safety, and right to quiet enjoyment of the premises by other tenants and including drug-related criminal activity, that threatens the health or safety of, or right to quiet enjoyment of the premises by other tenants. The conference report contains the Senate provision, amended to read that each public housing agency shall utilize leases which provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any quest (*sic*) or other person under the tenant's control shall be cause for termination of tenancy.